United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

487

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,346

UNITED STATES OF AMERICA

v.

WILLIAM T. DEANS

Appeal from a Judgment of the United States
District Court for the District of Columbia

JOHN O. HARPER
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(Appointed by this Court)

January 8, 1970

QUESTIONS PRESENTED

1. Did the Trial Court commit reversible error when when, during the course of a trial on a charge of abortion and attempted abortion, accused exhibits behavior on the witness stand, so bizarre and so prejudicial to his defense, that a mistrial is warranged, either by motion of counsel or sua sponte by the Court?

2. Did the Court commit reversible error when it instructs the jury with the "Allen Charge" instruction in its initial instructions to the jury, even though there is no indication that the jury will be hung and verdict returned shows that the jury did compromise in arriving at its verdict.

(This case has not previously been before this Court.)

INDEX

TABLE OF AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,346

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Appellant

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from a judgment of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant appeals from a conviction in the United States District Court for the District of Columbia of the crimesof Abortion and Attempted Abortion (22 D. C. Code Section 201).

REFERENCES TO RULINGS

None.

STATEMENT OF FACTS *

On August 23, 1968, with a temperature of 105° and relating that she had been "instrumented," to the resident gynocologist on duty, Dr. Beth A. Collins, the complainant, Ruthie Virginia Brisson, entered the George Washington University Hospital. (192). Dr. Collins further testified that, in her experience, all of the symptoms, together with the patient's history, indicated that an instrumented abortion had been performed on Mrs. Brisson. (195-A). On crossexamination, Dr. Collins stated there was nothing from her examination that led her to believe that Mrs. Brisson had been instrumented except her testimony to Dr. Collins. (197).

Acting on information given to hospital authorities, the Homicide Squad of the Metropolitan Police Department investigated the circumstances surrounding the alleged abortion. Investigating the crime in the instant case were Detective Sergeants Bernard Crook and Joseph O'Brien. Sergeant Crook related that he began his investigation by going to the location of the alleged abortion, 2141 Eye Street, N. W., Apartment 312, and talking with the sister

* Throughout this brief, the numbers in parentheses refer to the transcript of the trial in the United States District Court for the District of Columbia.

of Mrs. Brisson. (215). On the following day, Sergeant Crook arranged with Mrs. Brisson's sister to have the co-defendant called and requested to come to the alleged scene of the abortion. At that time, Sergeant Crook placed co-defendant Johnnie Lewis, under arrest and searched her pocketbook. (235). As a result of this search, Sergeant Crook recovered a slip of paper, bearing the following notation: "Mr. Wm. Dean, work number 343-4052, home, 723-9355." (224). After the government introduced evidence through Detectives Crook and O'Brien, and after the testimony of the complaining witness and her two sisters surrounding the circumstances of the abortion, the government rested its case, and counsel for both defendants moved for a judgment of acquittal on the grounds that the present status of the evidence was not sufficient, standing alone, to make out a prima facia case of guilty as charged. The Court considered the motions and denied them. (280). Co-defendant, Johnnie Lewis, then took the stand, and, in summary, admitted that the pocketbook was in her possession at the time that she appeared at the scene of the alleged abortion, but denied making the abortion or any participation in the act itself. (285, 286). After testifying herself, and introducing evidence to

corroborate her version of the incident through defendant, Johnnie Lewis' sister, Joan Lewis, the defense for co-defendant Lewis rested. (316).

Defendant, William T. Deans, then took the stand in his defense. The defense brought out upon direct examination that Deans knew nothing about the criminal acts of abortion and attempted abortion, and that he did not take part, in any way, in the crime. (325 through 328).

Upon cross examination, however, defendant Deans began to show the pressures of the trial. Counsel for the appellant, appointed by this Court, is the same counsel that represented William Deans at the trial below. The transcript does not show the vehemence with which Mr. Deans answered the question propounded to him by the Court on page 345, "Your Honor, being a black man, you can't stop a white women." However, counsel for the appellant wishes to emphasize that this answer was extremely forceful and, in the opinion of counsel for the co-defendant, warranted a mistrial. However, the Court denied the motion for the mistrial at this point. (345). Other answers to questions posed by the Assistant United States Attorney show the instability of Mr. Deans' mental condition during the trial. The observation that there was a "burning heart" in front of the United States Attorney was mentioned early in the crossexamination. (331).

On the day following the outburst mentioned above, defendant Deans broke completely during a hearing out of the presence of the jury, (386), and upon the motion of the attorneys for both defendants, (387), the Court donducted a voir dire examination of defendant Deans, while the jury was not in the courtroom. (388 through 391).

Upon further questioning of Mr. Deans by counsel for the co-defendant, Mr. Deans related other bizarre observations and described other extraordinary thought processes to the Court. (395 to 401).

After defendant Deans rested, the government introduced Sergeants O'Brien and Crook to rebut the evidence put on by Deans.

After all of the evidence was in, and prior to instructing the jury, counsel for both sides, in a coloquy with the Court, discussed the issue of whether or not defendant Deans should be presumed sane. The court found that there was no reason to halt the proceedings at that point and have the defendant examined. (507). In her charge to the jury, the judge included what is known as the "Allen Charge." (529). The defense counsel for both defendants made a timely objection to the use of the Allen Charge by the judge in her initial charge to the jury. (530,531).

STATUTORY PROVISIONS INVOLVED

22 D. C. Code §201

"Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; or if the death of the mother results therefrom, the person procuring or producing, or attempting to procure or produce the abortion or miscarriage shall be guilty of second degree murder."

STATEMENT OF POINTS

I. The trial court erred in not declaring a mistrial, sua sponte, because of the bizarre and unexpected behavior of the codefendant Deans. With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript: Transcript of Trial, pages 192, 195-A, 197, 215, 235, 224, 280, 285, 286, 316, 325 through 328, 345, 331, 386, 387, 388 through 391, 395 to 401, 507; Transcript of Sentencing Proceeding, page 4.

II. The trial court erred when it gave the Allen Charge in its initial instructions to the jury. With respect to Point II, appellant desires the Court to read the following page of the reporter's transcript: Transcript of the Trial, pages 529, 530, 531.

SUMMARY OF ARGUMENT

I. A trial judge's responsibility to guard against the possibility that an accused person may have become incompetent does not end when the trial begins, and all occurrences during the trial should be taken at their face value, and erratic behavior should be thoroughly investigated by the judge. Pouncey v. U. S., 349 F. 2d 699 (1965).

II. The trial court should not have given the "Allen" charge to the jury in its initial instructions, in this particular case. Moore v. U. S., 345 F. 2d 99 (1965).

ARGUMENT

I. DEFENDANT DEANS' COMPETENCE SHOULD HAVE BEEN FULLY EXPLORED EITHER BY MOTION OF COUNSEL OR SUA SPONTE, DURING THE TRIAL.

Defendant Deans' behavior on the witness stand, without any question, affected the ultimate decision of the jury. The behavior was also unexpected by all counsel in the case, as well as the trial court. The question is therefore posed, in this appeal, whether or not the judge should have taken additional steps to investigate the competency of defendant Deans at trial, and, if so, what these steps should have been. In the case of Pouncey v. U. S., 349 F. 2d 699 (1965), the court had before it a defendant whose competence for trial had been the subject of an examination at St. Elizabeths Hospital, Washington, D. C. The staff at St. Elizabeths had found Pouncey competent for trial, but Pouncey's trial counsel did not request a hearing on competence and no formal action on the report was instituted. However, trial counsel for Pouncey did introduce evidence which, in conjunction with Pouncey's actions on the witness stand, Id. at 701, placed the question of Pouncey's competence squarely before the court, even in the absence of an objection to the finding of competency by St. Elizabeth's.

In the instant case, the trial covered five full calendar days. Much of this time was taken up with direct, cross examination and rebuttal testimony concerning William Deans' version of the case. Certainly, Whalem v. U. S., 346 F. 2d 812 (1965), permits a trial judge wide discretion in matters respecting competence, and the competence of Deans certainly would appear to be before the Court for consideration, if all of his testimony on cross examination is carefully considered. The question therefore arises whether or not Judge Green, in recognizing the factors pertinent to the exercise of her discretion, took all steps necessary to ensure that Deans had a reasonable ability to understand the proceedings and comprehend the effect of his actions upon them, in accordance with the guidelines laid down in Dusky v. U. S., 362 U. S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1962). Thus, at the suggestion of counsel for the codefendant, the court conducted a voir dire examination of defendant Deans out of the presence of the jury, inquiring as to his mental health history. Other than eliciting from Deans that he had suffered from "Bell's palsy," and that he had been treated by a doctor at the Yater Clinic for hypertension and an apparent condition stemming from Bell's palsy, [Bell's palsy has been defined as a

paralysis of the facial nerves producing distortion of one side of the face, Webster's New International Dictionary (2d ed. 1955)], the court did not see fit to go behind these facts and inquire further into defendant's mental history. This Court felt, in the Pouncey case, that such inquiry would not delay or prejudice the trial in any way, 349 F. 2d at 701, in n. 4. Similarly, in this case, the court could have employed the use of a St. Elizabeth's Hospital report or the facilities of the Legal Psychiatric Service, without prejudice or delay of the court.

Therefore, as in Pouncey, defendant Deans' behavior on the witness stand should have been taken, and evidently was so taken, as a warning of incompetence. Whether Judge Green's voir dire enabled her to ascertain whether or not defendant Deans had a reasonable ability to understand the proceedings and comprehend the effect of his actions upon them, in accordance with Dusky v. U. S., is, at this time, an unaaswered question. It would certainly seem that, after reviewing the entire transcript of this proceeding, and, in addition, the short sentencing transcript, where on page 4 Judge Green suggests that defendant Deans seek psychiatric help, that Judge Green herself had lingering questions concerning Deans' competence.

Finally, with respect to this point, appellant proposes that this Court order a remand of this case to the trial court so that the trial court may re-examine in the consciousness of its discretionary power to act as it sees fit, the representations made to it at the trial by appellant's counsel. If the trial court should conclude that the power should have been exercised in favor of a sua sponte introduction by it of the insanity defense, then a new trial will fall. If it decides otherwise, the conviction will stand. This procedure was approved by this Court in Cross v. U. S., 354 F. 2d 512 (1965).

II. THE TRIAL COURT SHOULD NOT HAVE INSTRUCTED THE JURY WITH THE "ALLEN" CHARGE IN ITS INITIAL INSTRUCTIONS TO THE JURY.

On hearing the objection by counsel for both defendants to the giving of the Allen charge during her initial instructions, the Court observed that "The objection is paised practically every time." (Transcript of Proceedings, page 531). Appellant Deans contends that mere repetitive use of the Allen charge, which is upheld on appeal the majority of the time it is so used, does not warrant a blanket application of its use in every case.

The bench mark decision from which the charge gets its name is Allen v. U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896), where the trial judge charged:

"That in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each others argument; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority."

The charge given to the jury in the instant case is with minor exceptions which are not important to this appeal, verbatim to the charge given in the Allen case and approved by the United States Supreme Court.

In the case of Jenkins v. U. S., 117 U. S. App. D. C. 346, 330 F. 2d 220, reversed, 85 S. Ct. 1059 (1964), the court had before it a charge which went far afield from the limits delineated by the Allen charge. However, it is interesting to note, that neither the Jenkins case, nor a subsequent case before this court bearing on the same question, Moore v. U. S., 345 F. 2d 97 (1965), was the Allen charge given with the initial instructions to the jury.

In the case of Green v. U. S., a 5th Circuit decision, 309 F. 2d 852 (1962), the court had before it the propriety of using the Allen charge in the initial instructions to the jury. In an opinion quoted with approval in the dissent in the Jenkins case, the 5th Circuit Court of Appeals held:

"The Allen or 'dynamite' charge is designed to blast loose a deadlocked jury. There is small, if any, justification for its use. Nevertheless, an old decision of the Supreme Court has upheld the charge as a reminder to jurors that 'they should listen, with a disposition to be convinced, to each other's argument.' Allen v. United States, 1896, 164 U. S. 492, 17 S. Ct. 154, 41 L. Ed. 528, This is the outermost limit of its permissible use. There is no justification wahtever for its coercive use. The jury system rests in good part on the assumption that

the jurors should be deliberate patiently and long, if necessary, and arrive at a verdict--if, but only if, they can do so conscientiously. It is improper for the court to interfere with the jury by pressuring a minority of the jurors to sacrifice their conscientious scruples for the sake of reaching agreement." Green v. U. S., at page 854.

To say that the use of the Allen charge in the initial instructions to the jury in no way prejudices the defendant and only aids the jury in its deliberations, appellant Deans suggests, that the Court examine the [illegible] See the opinion of the 3rd Circuit Court of Appeals in U. S. v. Fioravanti, 412 F. 2d 407 (1969). In Fioravanti, the 3rd Circuit appears to expand on the thinking of the court in the Green case, and the expansion of that thinking is based on sound deductive reasoning. The current efficacy of the Allen charge in the District of Columbia should, in the opinion of the appellant, be examined in the light of the following observations of the court in Fioravanti:

"So long as the unanimous verdict is required in criminal cases, there will always be three possible decisions of the jury: (1) not guilty of any charge; (2) guilty of one or more counts of the indictment; and

(sic) no verdict because of a lack of unanimity. The possibility of a hung jury is as much as part of our jury unanimity schema as are verdicts of guilty or not guilty. And although dictates of sound judicial administration tend to encourage the rendition of verdicts rather than suffer the experience of hung juries, nevertheless, it is a cardinal principle of the law that a trial judge may not coerce a jury to the extent of demanding that they return a verdict.

"It is also suggested that the Allen charge is justifiable because it encourages the minority to consider the viewpoint of the majority; that this invitation to see the other man's point of view will discourage stubbornness, narrowmiddedness, and contrariness on the part of a few who would otherwise unnecessarily retard the workings of justice.

To accept the validity of this reasoning is to assume an inherently faulty major premise; that the majority is right and has reached its preliminary inclination by appropriately inspired processes, and that the minority in a given group possesses attributes of spurious rationality. But good reason does not depend upon numbers. A quantity of like impressions does not endow a conglomerate with the hallmark of sound judgment.

Indeed, as the history of this nation has witnessed, it is often a conscientious and determined minority which proves to be the safeguard against outrageous conduct wrought by tides and currents of public opinion.

"In order for the underlying postulate of the Allen charge--an instruction to consider the point of view of others--to be free of prejudicial inclinations, it would have to be expanded to read:

"' A Juror should listen with deference to his fellow jurors and with distrust of his own judgment if he finds that a large majority of jurors take a different view from that which he or she takes. Similarly, in such circumstances, one in the majority should distrust his own judgment if he finds a minority of jurors taking a different view from that which he or she takes."

"And such a chaege, of course, would be an invitation to a frolic with Alice in Wonderland.

"Thus is revealed the very real treachery of the Allen charge. It contains no admonition that the majority reexamine its position; it cautions only the minority to see the error of its ways. It departs from the sole legitimate purpose of a jury to bring back a verdict based on the law and the evidence received in open court, and substitutes therefore a direction that they be influenced by some sort of Gallup Poll conducted in the deliberation room.

"All of this constitutes an unwarranged

"All of this constitutes an unwarranted judicial invasion into the exclusive province of the jury and adds the blind imprimatur of the trial court to a matter of which it has absolutely no information: the results of the preliminary ballotting in the jury room. To the product of this informal poll is added the gloss of trial judge approval. A syllogism employed by Justice Udall in State v. Voeckall, 69 Ariz. 145, 210 P. 2d 972, 979 (dissenting opinion), aptly illustrates the effect which the Allen charge might well have on the jury:

"'The majority think he is guilty; the Court thinks I ought to agree with the majority so the Court must think he is guilty. While the Court did tell me not to surrender my conscientious convictions, he told me to doubt seriously the correctness of my own judgment. The Court was talking directly to me, since I am the one who is keeping everyone from going home. So I will just have to change my vote'"

Moreover, the Allen charge serves to substitute the coercive influence of any early polling of the jury for the give and take of group deliberation, a basic attribute of the jury system often expressed as a major characteristic justifying its continuance in our judicial system." U. S. v. Fioravanti, at 416-417.

CONCLUSION

Based on the foregoing, appellant's conviction on the count of the indictment charging him with attempted abortion should be reversed. At the very least, the case should be remanded for the taking of additional steps outlined in argument one to ensure that the defendant was competent for trial.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,346

UNITED STATES OF AMERICA, APPELLEE

v.

WILLIAM T. DEANS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THOMAS A. FLANNERY,
United States Attorney.
JOHN A. TERRY,
BROUGHTON M. EARNEST,
Assistant United States Attorneys.

ISSUES PRESENTED*

1. Whether the trial court properly exercised its discretion in refusing *sua sponte* to declare a mistrial; to order a mental examination for appellant; and to assert the insanity defense in appellant's behalf?

2. Whether the giving of the *Allen* charge prior to the jury's deliberations constitutes reversible error?

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*This case has not previously been before this Court.

380-478—70——1

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

OTHER REFERENCES

United States Court of Appeals

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted on October 21, 1968, along with a co-defendant, Johnnie E. Lewis, on one count of producing or procuring an abortion (22 D.C. Code § 201) and one count of attempted production or procuring of an abortion (22 D.C. Code § 201). The case came to trial on May 15, 1969, before a jury with the Honorable June L. Green presiding. On May 21, 1969, the jury returned a verdict as to both appellant and his co-defendant, acquitting them of the consummated crime of abortion, but finding them guilty of attempted abortion. Both appellant and his co-defendant received sentences on July 11, 1969, of twenty months to five years, two weeks to be served and the remainder to be suspended, with both to be placed on probation for five years pursuant to 18 U.S.C. § 3651. This appeal followed.

THE ABORTION

In July of 1968 Ruth Virginia Brisson learned that she was pregnant (Tr. 130). She informed her two sisters, Eleanore

Keville and Sarah (Sally) Feldt.[1] of her condition. and they decided to seek an abortion for her (Tr. 23–24). To this end Sally inquired of several friends to see if they knew of anyone who would perform an abortion (Tr. 59). Finally she called a former boy friend. Jon Feldman. who was an attorney on the staff of the Legal Aid Agency. From Feldman she obtained the name and telephone number of appellant (Tr. 60). whom both Sally and her sister Eleanore had met some months earlier when in the company of Jon Feldman (Tr. 27–29). A series of phone calls was then made by Sally to appellant in which appellant arranged to obtain pills at a cost of $30 which would cause Ruth to abort. In addition appellant informed Sally that he knew a doctor who would perform the abortion at a cost of between $500 and $800 if the pills did not work. (Tr. 64–65. 68–69)

Pursuant to this arrangement Eleanore and her sister Ruth went to appellant's home. received instructions from appellant regarding the pills. paid appellant the $30.00 and left (Tr. 32–34). Ruth took the pills. but when nothing happened her sister Sally again contacted appellant. This time appellant arranged to have a "nurse" perform the abortion at a cost of $200. (Tr. 69–71). Originally the plan was to perform the abortion at appellant's house. but because of delays due to an automobile breakdown. the abortion was performed the following day at the apartment of Ruth's sister Sally. located at 2141 I Street. Northwest (Tr. 72–74).

At the appointed hour appellant arrived at Sally's apartment and received the $200. He then left and returned within five minutes with the "nurse" who was to perform the abortion. This "nurse" was introduced as "Irene". But later was identified as appellant's co-defendant. Johnnie Lewis (Tr. 74–78. 90–91). Mrs. Lewis then produced a rubber catheter (later introduced into evidence at trial by the Government. Tr. 225). and a wire and performed a very crude operation upon Ruth. Sally watched the operation which lasted about one-half hour. Mrs. Lewis then gave some brief instructions and left. promising to call back the next day. (Tr. 77–83). Ruth became very ill dur-

[1] The three sisters will hereafter be referred to simply by their first names. Ruth. Eleanore and Sally.

ing the following day, however, and Sally decided to take her to George Washington University Hospital. Ruth was admitted to the emergency room at the hospital, and the police were summoned (Tr. 92–94).

Sally then arranged with the police to call appellant and to request him to have Mrs. Lewis return to Sally's apartment (Tr. 95–97). Police officers were waiting in Sally's apartment when Mrs. Lewis arrived, and they immediately placed her under arrest. At the same time they recovered from Sally the piece of rubber which Mrs. Lewis had employed in the operation (Tr. 98–99). At the time of her arrest police searched Mrs. Lewis' pocketbook and recovered a piece of paper bearing appellant's name and phone number (Tr. 223–224). Appellant was arrested afterward on a warrant.

THE TRIAL

The first three witnesses the Government called were the aborted woman, Ruth and her two sisters, Eleanore and Sally. Each of these women described the events leading up to the abortion, and all three made in-court identifications of appellant as the man who arranged the abortion (Tr. 28, 75, 137). In addition, Sally and Ruth identified Mrs. Lewis as the actual perpetrator of the abortion (Tr. 77, 139).[2]

The two doctors from George Washington University Hospital who treated Ruth then testified. Doctor Beth A. Collins first treated Ruth in the emergency room and diagnosed her illness as a septic or infected abortion (Tr. 193). On the second day after her admission to the hospital Ruth passed a fetus. Doctor Collins, distinguishing between natural and instrument-induced miscarriages, characterized Ruth's condition as "more consistent with an instrument-induced" miscarriage (Tr. 195). Doctor George Bentrem testified that Ruth's miscarriage was generally classified as "criminally induced or at least an abortion performed under unsterile conditions" (Tr. 212).

Appellant then took the stand in his defense. Appellant's testimony was very confused. He generally related having

[2] The third sister, Eleanore, had not viewed the co-defendant Lewis, having left town shortly after the initial arrangements were made with appellant (Tr. 36).

turned over some pills to Sally, or "Kay" as he knew her, at his apartment (Tr. 321–322, 337). He also admitted having gone to Sally's apartment at 2141 I Street, NW. (Tr. 324), but denied any knowledge of an abortion (Tr. 358). Appellant at one point accused the prosecutor of "trying to make me look like a fool" (Tr. 345). At this point counsel for Mrs. Lewis, having approached the bench, asked for a mistrial on the basis of appellant's outburst and his doubts about appellant's mental stability (Tr. 345–346). Appellant's own counsel, however, did not join in the motion for a mistrial but merely indicated to the court that he was surprised by appellant's conduct (Tr. 346). The prosecutor opposed a mistrial, and the trial court denied the motion (Tr. 347).

Detective Sergeants Bernard Crooke and Joseph O'Brien testified that they had recovered the catheter used in the operation (Tr. 215–216) and had placed Mrs. Lewis under arrest (Tr. 221–222). Jon Feldman, formerly an attorney with the Legal Aid Agency, was called by the Government and testified that he had given appellant's phone number to Sally when she explained she was looking for someone to perform an abortion (Tr. 244–249).

After the Government rested its case, Mrs. Johnnie Lewis took the stand. She admitted being arrested in Sally's apartment but denied having been there earlier to perform an abortion. She testified that she had gone to the apartment at appellant's request merely to clean the apartment (Tr. 287). Johnnie Lewis' sister, Joan Lewis, also testified that Johnnie Lewis' purpose in going to Sally's apartment was to do housework (Tr. 303–316).

After further testimony appellant apparently became emotionally upset (Tr. 386), and Mrs. Lewis' counsel moved that the trial court in effect make inquiry about appellant's competency. Appellant's counsel joined in this motion (Tr. 387), whereupon, the trial court proceeded to question appellant out of the presence of the jury concerning his competency. Appellant responded that he had never been under a psychiatrist's care and that there was no history of illness in his family. The only illness appellant had suffered from was Bell's palsy, a nervous condition. In addition, appellant indicated he had been

employed with the General Services Administration for eighteen years and had never lost any time from work. (Tr. 388–392) After appellant regained his composure (Tr. 392) the trial continued. The two detectives who had arrested appellant were recalled out of the presence of the jury, and both indicated that appellant did not appear to be irrational at any time after his arrest, but to the contrary he was "normal" and "calm" (Tr. 415–416, 419). Although appellant presented two character witnesses when the trial resumed, neither of these persons gave any indication that appellant was suffering from a mental illness.

At the conclusion of the defense testimony and the Government's rebuttal, the prosecutor brought up the subject of appellant's competency and asked for a specific ruling that in the trial court's judgment there was no need to halt the proceedings and have appellant examined. The trial court so ruled. (Tr. 506–507.) During the discussion about proposed instructions appellant's trial counsel made no request for an insanity instruction even after the prosecutor pointed out that no such request had been made (Tr. 507). The trial court's initial instructions to the jury included a form of the *Allen*[3] charge (Tr. 529) to which appellant made timely objection (Tr. 530–531).

ARGUMENT

I. The trial court was acting within its sound discretion in refusing to grant a mistrial *sua sponte* and in declining to order a mental examination *sua sponte* for appellant or to assert an insanity defense in his behalf

(Tr. 255–256, 387–389, 401–405, 416–419, 455–468, 506–507)

Appellant contends that because of his behavior on the witness stand the trial court should have done more than it did to investigate appellant's competency. Specifically, appellant argues that the trial court erred in not declaring a mistrial because of appellant's behavior (Brief for Appellant, p. 7). After a discussion of his competency appellant concludes by asking for a remand to determine whether or not the trial court *sua sponte* should have introduced the defense of insanity in

[3] *Allen* v. *United States*, 164 U.S. 492, 501 (1896).

appellant's behalf. In so contending appellant has failed to distinguish between two entirely separate issues: (a) whether or not appellant was competent to stand trial and (b) whether or not appellant was criminally responsible for his acts. In a determination of competency appellant's condition at the time of trial is the critical factor, whereas on the issue of criminal responsibility appellant's condition at the time of the crime is determinative. If a defendant is found to have been suffering from a mental disease or defect at the time of the alleged crime, then the further determination must be made as to whether or not the alleged crime was the product of his mental illness. See generally *Bolton* v. *Harris*, U.S. App. D.C. 1, 395 F.2d 642 (1968). *Lyles* v. *United States*, 103 U.S. App. D.C. 22, 254 F.2d 725 (1957), *cert. denied*, 356 U.S. 931 (1958).

A. The trial court made sufficient inquiry into appellant's competence to stand trial

Appellant contends that the trial court should, either on counsel's motion or *sua sponte*, have made further inquiry into his competence. The fact is, though, that appellant's trial counsel never made any motions at trial concerning appellant's competency, nor did he ask for a mistrial. During a bench conference counsel for appellant's co-defendant suggested that the trial judge examine appellant as to his possible psychiatric background. When the prosecutor objected on the ground that appellant's counsel had not made any such request, counsel for appellant then joined in the request (Tr. 387). Pursuant to this request the trial judge questioned appellant out of the presence of the jury and ascertained that appellant had never received any kind of psychiatric or psychological treatment. Neither was there any history of mental illness in appellant's family (Tr. 388). The only illness appellant had suffered was Bell's palsy (Tr. 389), which appellant concedes is not a mental illness but rather a nervous condition. After the court had examined appellant the trial continued. At no time was a request made for a mental examination of appellant.

The defense presented no psychiatric testimony as to appellant's competence. Furthermore, the two character witnesses called by the defense gave no testimony that would indicate

appellant was mentally ill or incompetent (Tr. 455–468). The arresting officer, Detective Sergeant Joseph O'Brien, noticed nothing abnormal about appellant and found him to be coherent (Tr. 416–419). Jon Feldman, the former Legal Aid Agency attorney, had known appellant for six or seven years as a "good friend" (Tr. 255) and had even contemplated hiring appellant as an investigator if he decided to go into private practice (Tr. 256). In regard to appellant's mental state Mr. Feldman remarked, "I never found him to be living in a fantasy world one percent of the time like I would say she [Sally] does". (Tr. 256.)

Appellant's claim of incompetence is also inconsistent with the evidence of his work background. The record shows that he worked in a security position with the General Services Administration, that he had been so employed for eighteen years, and that he possessed a security clearance from the Federal Bureau of Investigation (Tr. 401–403). The prosecutor observed that there were a number of consultations throughout the trial between appellant and his attorney (Tr. 404) with information flowing from appellant to his attorney. Most important of all, perhaps, was the evaluation of appellant's competency made by his own attorney at the request of the trial court:

> Mr. HARPER. I think the best way to explain this, Your Honor, would be to say that this defendant does not have a law degree. I think that he understands that the Government is holding him responsible for some acts and I think the acts here, Your Honor, are understood by him. I don't think he understands all the nuances involved in the various aspects of the charge of abortion and attempted abortion.
>
> I have explained those to him but I don't think that he—as a man that has not had a great degree of education as great as attorneys—I don't think he understands all the nuances and I think to that extent, Your Honor, I can represent that I have explained this case as fully as in my power.
>
> The COURT. Now I would like to ask you, Mr. Harper, if he has understood them about the same degree as any

other layman who has had no legal background and who had approximately the same degree of education.

Mr. HARPER. I would represent that, yes, Your Honor.

The COURT. He did understand about the same degree?

Mr. HARPER. That is correct, Your Honor. (Tr. 404–405.)

At the conclusion of all the evidence prior to the jury deliberations, the prosecutor asked the trial court to make a specific finding in regard to appellant's competency, and the trial court found that there was no reason to halt the proceedings and have appellant examined (Tr. 506–507).

In determining whether the trial court's finding of competency constituted reversible error one must begin with an appreciation of the broad discretion vested in the trial court in regard to a defendant's competency to stand trial. The very statute which allows a trial judge to order a mental examination for a defendant when in doubt as to his competency is couched in terms of the judge's discretion:[4] the court *may* order a mental examination, but the court is not compelled to do so. Appellant is entitled to relief, then, only if he can make out an abuse of the trial court's discretion in finding him competent, and in failing to declare a mistrial or order a mental examination.

The test of competency as enunciated by the Supreme Court "must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well

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[4] 24 D.C. Code § 301(a) reads in pertinent part:

> Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court *may* order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital (emphasis added).

as factual understanding of the proceedings against him." *Dusky* v. *United States*, 362 U.S. 402 (1960). Certainly by this standard it would appear that appellant was competent to stand trial. To be sure, appellant's testimony at trial contained bizarre statements, and at one point he broke down and wept. Whether appellant's conduct was feigned or sincere the record cannot reveal. The trial court, in any event, was able to observe appellant's demeanor and draw its own conclusion as to whether appellant was malingering or not. This Court has held that such a finding must be honored on appeal unless clearly erroneous. *Dillane* v. *United States*, 127 U.S. App. D.C. 377, 384 F.2d 329 (1967), and cases cited therein at 378 n.5, 384 F.2d at 330 n.5. In this regard we note that the mere fact that there may be something mentally wrong with a defendant, or that he may be emotionally unstable, does not necessarily render him mentally incompetent to stand trial.[5] *Lebron* v. *United States*, 97 U.S. App. D.C. 133, 229 F. 2d 15 (1955), *cert. denied*, 351 U.S. 974 (1956).[6]

The case principally relied upon by appellant, *Pouncey* v. *United States*, 121 U.S. App. D.C. 264, 349 F. 2d 699 (1965), is a far cry from the situation at bar. In *Pouncey* the defendant had been sent to Saint Elizabeths Hospital for a mental examination prior to trial. The hospital report indicated Pouncey was competent, and no hearing was requested by the defense on this finding. During the trial, however, the defendant exhibited extremely bizarre behavior. He accused his own attorney of being in league with the prosecutor, and at one point he took the stand in the presence of the jury and said, "Plead me guilty to the charge." In spite of this conduct the trial court made no inquiry whatsoever into the defendant's competency. This Court reversed the conviction, relying on two factors in particular:

> Events during the trial cast serious doubt on appellant's "ability to consult with his lawyer."
>
> * * * * *

[5] Accordingly, the fact that the trial court recommended that appellant seek psychiatric help at the time of sentencing does not detract from the court's earlier finding of competency.

[6] See also *United States* v. *Roland*, 318 F. 2d 406 (4th Cir. 1963).

> Although a judge has wide discretion in matters respecting competence, as we held in *Whalem*[7] he should recognize factors pertinent to its exercise. Here the judge allowed the trial to proceed without even an intimation that a problem was presented. 121 U.S. App. D.C. at 266, 349 F. 2d at 701.

Neither of these two factors is present in the instant case. Appellant's trial counsel indicated no difficulty in appellant's ability to consult with him. Furthermore, the trial court in the instant case did stop the trial and conduct a hearing before determining appellant was competent. Hence the instant case does not suffer from the shortcomings pointed out by the Court in *Pouncey*.[8]

In a more recent case this Court upheld a conviction in spite of a similar claim that the trial court had abused its discretion. In *Green* v. *United States*, 128 U.S. App. D.C. 408, 389 F. 2d 949 (1967) (*en banc*), it was contended that the trial court had erred in failing *sua sponte* to hold a competency hearing. In spite of the fact that the defendant in *Green* had been acquitted by reason of insanity in a 1961 trial and had been committed to Saint Elizabeths Hospital, this Court found no abuse of discretion in the trial court's failure to hold a competency hearing in his 1963 trial:

> We need only determine that *Pate*,[9] while giving constitutional proportion to the accused's right to a judicial competency hearing when it is either requested or compelled as a matter of judicial due process on the facts of a given case, clearly does not remove from judicial discretion determination regarding the *sua sponte* conduct of such a hearing, and that the question in all such cases remains whether the trial judge has abused his discretion in the particular case before him. 128 U.S. App. D.C. at 412, 389 F. 2d at 953.

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[7] *Whalem* v. *United States*, 120 U.S. App. D.C. 331, 346 F. 2d 812 (1965) (*en banc*).

[8] *Compare Cannady* v. *United States*, 122 U.S. App. D.C. 120, 351 F. 2d 819 (1965), where the defendant's trial counsel alleged serious doubts about the defendant's ability to assist counsel and pointed to the defendant's family history of mental illness.

[9] *Pate* v. *Robinson*, 383 U.S. 375 (1966).

The instant case is not as troublesome as *Green* in that the trial court in the case at bar actually held a hearing before deciding that appellant was competent.[10]

Thus the trial court acted properly in not ordering either a mistrial *sua sponte* or a mental examination for appellant. The trial court took the precaution of holding a hearing out of the presence of the jury and examining appellant as to his competency. The court also heard testimony from other witnesses who were personally familiar with appellant. After ascertaining from appellant's trial counsel that appellant understood the nature of the proceedings as well as any layman could be expected to, and after personally observing appellant's demeanor throughout the trial, the trial judge determined that appellant was competent and that there was no need to make any further inquiry into the subject. We respectfully submit that the trial judge's action constituted a proper exercise of the broad discretion with which she was vested in competency matters.

B. There was no evidence upon which the trial court *sua sponte* could have asserted the defense of insanity in appellant's behalf

Appellant concludes his argument with the suggestion that his case be remanded to the trial court for a determination of whether the trial court should have introduced *sua sponte* the insanity defense. His only authority in support of such a suggestion is *Cross* v. *United States*, 122 U.S. App. D.C. 380, 354 F. 2d (1965). *Cross*, however, was predicated upon an entirely different set of facts from those of the instant case. In *Cross* the defense attorney had informed the trial court that, although the circumstances indicated that an insanity defense might be appropriate, the defendant had forbidden him to raise it. The court mistakenly indicated that it did not believe itself pos-

[10] *See also Lebron, supra*, where this Court upheld the trial court's refusal to grant the defendants a mental examination in the course of the trial on the grounds that, "The motion . . . fell short of meeting the statutory requirements as to the belief of the movant concerning the mental condition of the accused. Counsel did not say he had reason to believe and did believe that the defendants 'may be presently insane' or otherwise so mentally incompetent as to be unable to understand the proceedings against them or to assist in their own defense." 97 U.S. App. D.C. at 135, 229 F.2d at 18.

sessed of any discretion to inject the insanity issue into the trial over the defendant's objection. This Court then, citing its opinion in *Whalem*, *supra*, which sanctioned a *sua sponte* introduction of the insanity defense even over a defendant's objection,[11] remanded the case for a determination by the trial court of whether or not the insanity defense would have been appropriate.[12] In the instant case there was never any assertion by trial counsel that an insanity defense would be appropriate, nor was there any apparent misunderstanding by the parties as to whether or not the trial court could raise the issue. As a matter of fact, there was a complete dearth of evidence concerning appellant's mental condition at the time of the offense. The possibility of an insanity defense was never suggested, nor was any evidence adduced at trial bearing upon the issue.

The case at bar is more akin to *Smith* v. *United States*, 122 U.S. App. D.C. 300, 353 F. 2d 838 (1965), where the defense actually attempted to raise the insanity defense but the trial court disallowed such a defense because of the absence of any evidence fairly supporting it. This Court affirmed the trial court's action. If the insanity defense was properly kept from the jury's consideration in that case, even where the defense actively sought to raise it and put on supporting testimony, how much less appropriate would it have been for the trial court in the instant case to assert such a defense in the absence of a defense request and in the absence of any relevant evidence? We respectfully submit that the trial court quite properly kept the insanity issue out of the case.

II. The trial court properly gave an *Allen* charge to the jury as a part of the general instructions before the jury retired to begin its deliberations

As part of the instructions delivered before the jury retired, the trial court gave the following version of the *Allen* charge, to which appellant objected:

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[11] *Whalem* was decided after the *Cross* case was tried.

[12] After the remand in *Cross* the District Court held a hearing and determined that it would not have raised the insanity defense against the will of the defendant even if it had been aware that it had the discretion to do so (see footnote 10, *supra*). This Court affirmed that decision. *Cross* v. *United States*, 128 U.S. App. D.C. 416, 389 F. 2d 957 (1968).

> You should listen to each other's arguments with a disposition to be convinced. If much the larger number of jurors are for conviction a dissenting juror should consider carefully whether his doubt is a reasonable one when it makes no impression upon the minds of so many jurors equally honest, equally intelligent with him or herself.
>
> If, on the other hand, the majority are for acquittal the minority ought to ask themselves and carefully consider whether they might not reasonably doubt the correctness of their judgment which is not concurred in by the majority.

Appellant concedes that the form of the charge in the instant case comports substantially with that originally approved by the Supreme Court in *Allen*. The thrust of appellant's argument seems to be that the timing of the charge, being given at the outset of the deliberations rather than after a deadlock, was prejudicial. We cannot agree that the *Allen* charge is coercive, especially when it is given at the outset of the deliberations and thus prior to determination of majority and minority views. The giving of a well-worded *Allen*-type charge is sound practice when the charge is given at the outset of the jury's deliberation. Its purpose is to encourage the jury to reach a verdict. Appellant argues that there is a coercive effect on the jury when the charge is given at the outset. This Court has answered such a contention in *Kent* v. *United States*, 119 U.S. App. D.C. 378, 343 F.2d 247 (1964), *rev'd on other grounds*, 383 U.S. 541 (1966):[13]

> [C]ontroversy about the *Allen* charge derives from the circumstance of its being given after the jury has been deliberating for some time and has failed to agree. We We need not now speculate about its coercive effect in that type of case. Here it was given before the jury went out, and as part of the general instructing of the jury. Its coercive impact, if any, in this context surely cannot

[13] See also *Fulwood* v. *United States*, 125 U.S. App. D.C. 183, 369 F.2d 960 (1966), *cert. denied*, 387 U.S. 934 (1967).

be equated with the degree of error for which an appellate court will reverse . . . .[14]

Most recently in *United States* v. *McNeil*, D.C. Cir. No. 22,360, decided October 21, 1969, slip op. at 2 n.2, this Court, citing its earlier decision in *Fulwood*, sanctioned the giving of the *Allen* charge before the jury retired. See *Nick* v. *United States*, 122 F.2d 660, 674 (5th Cir.), *cert. denied*, 314 U.S. 687 (1941), also cited with approval in *McNeil*. Although in the case at bar, appellant objected to the giving of the *Allen* charge, unlike *McNeil*, appellee submits that *McNeil* and *Fulwood* are nevertheless dispositive.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
BROUGHTON M. EARNEST,
Assistant United States Attorneys.

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[14] 119 U.S. App. D.C. at 392, 343 F.2d at 261.

U. S. GOVERNMENT PRINTING OFFICE: 1970

PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NUMBER 23,346

UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE

VS.

WILLIAM T. DEANS,

PETITIONER-APPELLANT

PETITION OF APPELLANT-DEFENDANT

WILLIAM T. DEANS FOR REHEARING

John O. Harper, Esquire
Counsel for Petitioner
(Appointed by this Court)
1744 R Street, N. W.
Washington, D. C. 20009

July 21, 1970

TABLE OF CONTENTS

Table of Authorities

Authority — Page Number

Authority — Page Number

Wisconsin Statutes §940.04 Abortion (con't)

(3) Any pregnant woman who intentionally destroys the life of her unborn child or who consents to such destruction by another may be fined not more than $200 or imprisoned not more than 6 months or both.

(4) Any pregnant woman who intentionally destroys the life of her unborn quick child or who consents to such destruction by another may be imprisoned not more than two years.

(5) This section does not apply to a therapeutic abortion which:

(a) Is performed by a physician; and

(b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

(6) In this section 'unborn child' means a human being from the time of conception until it is born alive. 3

THE ISSUE PRESENTED

Must an appeal from a conviction of attempted abortion under the applicable District of Columbia code section be held in abeyance until the final disposition of a question based on the constitutionality of that statute in its present form, the form under which petitioner was indicted, tried and convicted?

REFERENCES AND RULINGS

On July 8, 1970, this Court issued an order affirming the judgment of the District Court for the District of Columbia, finding the petitioner guilty of the crime of attempted abortion. There are no reporter citations or page references in the appendices of the parties referred to in this order.

PETITION FOR REHEARING

This Petition for Rehearing is filed by counsel appointed by this Court, petitioning this Court for a rehearing of the question argued by counsel on June 22, 1970, and decided by this Court on July 8, 1970.

STATEMENT OF THE CASE

Petitioner-appellant was indicted on October 21, 1968, under the District of Columbia abortion statute, in a two-count

indictment charging him with the crimes of abortion and attempted abortion. Tried by jury from May 15 to May 21, 1969, he was convicted on May 21, 1969, of the crime of attempted abortion and sentenced on July 11, 1969. Perfecting his appeal to this Court, argument was had on the appeal, and at the time of the argument, counsel for petitioner-appellant was asked by the Honorable Harold Leventhal, Circuit Judge, whether or not any consideration had been given to the question of the constitutionality of petitioner-appellant's conviction because of the case of the United States v. Vuitch, 305 F. Supp. 1032 (1969), to which said counsel replied in the negative. This Petition for a Rehearing is therefore filed to put this question squarely before the Court.

ARGUMENT

AN APPEAL FROM A CONVICTION OF ATTEMPTED ABORTION UNDER THE APPLICABLE DISTRICT OF COLUMBIA CODE SECTION MUST BE HELD IN ABEYANCE UNTIL THE FINAL DISPOSITION OF A QUESTION BASED ON THE CONSTITUTIONALITY OF THAT STATUTE IN ITS PRESENT FORM, THE FORM UNDER WHICH PETITIONER WAS INDICTED, TRIED, AND CONVICTED.

The Vuitch decision, decided on November 10, 1969, was a ruling on a motion to dismiss an indictment based on the same

section of the D. C. Code, that is, the abortion section, that the petitioner here was indicted, tried and convicted under.

The defendant in the Vuitch case was a licensed physician, authorized to practice in the District of Columbia. Shirley A. Boyd the defendant in the companion case which was considered at the same time as the Vuitch case, was a nurse's aide. Judge Gesell distinguished between the standing of Vuitch to question the constitutionality of the statute and the standing of Boyd to so question it. Id, at 1035. The distinction is based on Judge Gesell's holding that only that portion of the statute relating to an exception to the prohibition against abortions-"as necessary for the preservation of the mother's life or health.", is so vague as to deprive Vuitch of the due process of law, as is required in a criminal statute. Id, at 1034.

Petitioner William T. Deans here asks this Court to consider an appropriate and orderly next step in modernizing this archiac remnant of the D. C. Code: declare the present abortion statute unconstitutional, not only as to licensed physicians, but also as to all persons indicted under this anachronistic statute. Another jurisdiction has been quick to cite Judge Gesell's ruling as timely and farsighted. Babbitz v. McCann, 306 F. Supp. 400 (1969). In addition, other jurisdictions have acted to strike down, as

unconstitutional, statutes strikingly similar to that currently in force in the District of Columbia. See People v. Belous, 80 Cal. Rptr. 354, 458 P. 2d. 194 (1969), where the California court ruled a statute basically unchanged since 1850 unconstitutional.

CONCLUSION

Petitioner therefore respectfully requests that his Petition for Rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.